IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

VIVIENNE ELLA WELTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, People of the State of California, respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the

County of Los Angeles entered against it on December 5, 1973, No. CRA 12083, with petition for rehearing and/or certification being denied December 20, 1973.

OPINIONS BELOW

A written (unpublished) "Memorandum Opinion and Judgment" issued from the lower court. An accurate copy of that opinion is appended to this petition as Appendix A by this reference is made part of the petition as if it had been fully set forth herein.

JURISDICTION

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles reversed respondent's conviction and declared the municipal ordinance to be unconstitutionally overbroad on its face on December 5, 1973. A timely petition for rehearing and/or certification to the Court of Appeal of the State of California was denied December 20, 1973. This petition was filed within 90 days of that date.

A petition for writs of certiorari and prohibition to the California Court of Appeal was denied (for procedural reasons) on January 16, 1974. A true and correct copy of that order of the California Court of Appeal is appended to this petition as Appendix B and by this reference is made part of the petition as if fully set forth herein.

Timely petition for hearing to the California Supreme Court was denied (presumably also on procedural grounds) on February 14, 1974. A true and correct copy of that order of the California Supreme Court is appended herewith as Appendix C and by this reference is made part of the petition as if fully set forth herein.

Jurisdiction is herein invoked under 28 U.S.C. § 1257(3):

> "By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution. . . ."

A city ordinance is a state statute within

28 U.S.C. §1257(3). Jamison v. Texas (1943) 318 U.S. 413, 87 L.Ed. 869, 63 S.Ct. 669.

QUESTIONS PRESENTED

1. Whether the First Amendment of the United States Constitution protects the sales of commercial printed matter which are made at locations on public thoroughfares in violation of a municipal ordinance which restricts the manner of sales of goods, wares, and merchandise to property which is not located on public streets, sidewalks, and parkways, where the sole intent of the sales of such printed matter is personal economic profit and not the dissemination of information, ideas, opinions, views, or beliefs.

2. Whether printed matter is automatically protected by the federal First Amendment irrespective of the commercial aspects of its distribution on public streets and sidewalks.

3. Whether municipalities are constitutionally compelled to limit the regulation of commercial sales of printed matter to

areas of vehicular traffic and cannot extend such regulation to pedestrian traffic on public streets and sidewalks.

4. Whether a municipal regulation of commercial activities on public streets and sidewalks which allows an exemption for sale of newspapers and news periodicals violates equal protection of the law.

5. Whether a separate trial procedure is necessary to require an affirmative judicial finding of First Amendment "non-protectedness" before that issue can go to the jury.

STATUTES INVOLVED

First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment to the Constitution of the United States in part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

Fourteenth Amendment to the Constitution of the United States in part:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, section 13, Constitution of the State of California provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . . ."

Los Angeles Municipal Code § 42.00(d), as amended October 24, 1972:

> "Street-sidewalk-sale of goods prohibited. No person, except as otherwise provided in subsection

"j" of this section, shall offer for sale, solicit the sale of, or have in his possession, control or custody, whether upon his person or upon some other animate or inanimate object, any goods, wares or merchandise which the public may purchase at any time, on any street, sidewalk, or parkway or portion thereof."

Los Angeles Municipal Code §42.00(j), as amended November 20, 1972:

"Streets-sidewalks-news vendors. No person shall sell or offer for sale any newspaper, magazine, periodical or other printed matter while upon the roadway of any public street within the City of Los Angeles provided, however, that persons engaged in selling or offering for sale or disposing of newspapers, or other printed news periodicals may sell, offer for sale, cry, call attention to, hawk, advertise and proclaim the same upon any portion of the sidewalk or parkway.

"No person, under the age of 10 years, shall sell or offer for sale any newspaper, magazine or periodical or other printed matter while upon any portion of a public street of the City of Los Angeles. This section shall not prohibit persons, except as otherwise prohibited by law, from soliciting the sale of or delivery of newspapers, magazines, periodicals and other printed matter to residences or places of business fronting upon a public street."

STATEMENT OF THE CASE

Respondent, Mrs. Vivienne Ella Welton, was arrested on February 4, 1973, by officers of the West Los Angeles Division of the Los Angeles Police Department after they received information that a female caucasian named "Mrs. Welton" was selling movie maps at the corner of Sunset Boulevard and Baroda Drive in the City of Los Angeles. Mrs. Welton had been warned on January 26, 1973, by West Los Angeles Police, that sales at that location would

violate Section 42.00(d) Los Angeles Municipal Code. Mrs. Welton had telephoned the West Los Angeles Police Commander's office on January 29, 1973, at 3:00 p.m., to inform him that she would be at her usual sales location on February 4, 1973, at 12:00 p.m.

At the location were two (2) large signs (approximately three feet by four feet) with 12-inch lettering stating "Movie Maps." The signs were placed back-to-back on the corner so to be visible to both east and westbound traffic on Sunset Boulevard. Each sign had a large arrow pointing northbound to Baroda Drive. Respondent was seated in a folding chair on the west side of Baroda Drive about three feet from the curb and 200 feet north of Sunset Boulevard. On her person at that location were found several movie maps. As the officer approached the location, he asked respondent if she were "Mrs. Welton" and if she were selling movie maps. Respondent answered "yes" to both questions. The two signs and four movie maps were booked as evidence.

After her arrest and arraignment, the matter was set for jury trial in Division 92 of the Los Angeles Municipal Court. On the trial date, defense counsel argued the unconstitutionality of Los Angeles Municipal Code §42.00(d), as an abridgment of federally protected rights of free speech, equal protection, and due process on a motion to dismiss the complaint. The motion was heard and denied. A jury was properly selected and sworn. The People waived Opening Statement.

Respondent, by her counsel, began her Opening Statement by indicating the length of time (since 1938) that her family had been in the business of publishing and sidewalk selling of Hollywood movie maps (R.T. p. 8). Respondent had personally been involved in the publication and sales since 1960 (R.T. 9:1). The evidence was not in conflict except as to one restricted issue, i.e., whether respondent's selling things of that nature came within the statutory exemptions accorded to "other printed news periodicals" [Los Angeles Municipal Code §42.00(j)] (R.T. 9:23-26). Respondent alleged that her movie maps were

"news periodicals" as contemplated by the exemption (R.T. 10:6) because the information supplied by the movie map regarding the location of movie stars' homes (whether still living or moved) is "news" (R.T. 10:14-20 and 11:12). The real question, suggested respondent, was the type of information presented (R.T. 11:1). Respondent concluded her Opening Statement.

Four maps taken from respondent at the time and location of her arrest were entered into evidence by stipulation. They were marked collectively as People's #1 in evidence. The two large advertising signs were not offered into evidence. Thereafter the following stipulation was read to the jury:

> "On or about February 4, 1973, in the City of Los Angeles, the defendant, Vivienne Ella Welton, did offer for sale and solicit the sale of, and have in her possession the items marked People's #1 [four (4) movie maps] which the public could purchase at any time on a parkway or portions thereof."

The People rested its case.

Respondent, Mrs. Welton, took the stand, was sworn, and testified substantially as follows: That her purpose in selling the maps was a major source of income to support herself economically (R.T. 14:27); that her family has been in the business since 1936 (R.T. p. 15); that the maps are revised on a near quarterly basis with at least one change per revision (R.T. 15:26); that her location is the corner of Sunset Boulevard and Baroda Drive (R.T. p. 21); that she does use signs at the location advertising the movie maps, some of them a block away from the location with an arrow indicating "around the next corner" in letters large enough to be visible to vehicles and pedestrian traffic on Sunset Boulevard (R.T. 21:23-27); that she invites her passing motorist customers to park adjacent to the curb (R.T. 23:8-14); that she "can't" talk to a motorist-customer who is parked with the rear end of his vehicle protruding into traffic (Ibid); that occasionally a motorist-customer does park to make a sale with his vehicle sticking out from the curb and therefore into the

traffic lane (R.T. 23:11).

Upon cross-examination respondent admitted that the map contains no commentary whatsoever (R.T. 24:6), but consists merely of a map with a listing of approximately 250 names and numbers, and that the homes are not particularized or described in any other manner (R.T. 24:7-17).

The matter was argued. The jury was instructed. Among the People's requested instructions, the following were given:

1) Los Angeles Municipal Code §42.00(d) in the language of the statute (as modified by the court);

2) Los Angeles Municipal Court §42.00(j) in terms of the legality of sidewalk sales and solicitations of newspapers or other printed news periodicals;

3) "Newspaper" in terms of The Random House Dictionary of the English Language (unabridged ed., 1967) as modified by the court;

4) "News" in terms of The Random House Dictionary of the English Language (unabridged., 1967) as modified by the court;

5) "Periodical" in terms of "The Random House Dictionary of the English Language (unabridged ed., 1967) as modified by the court;

6) "Magazine" in terms of The Random House Dictionary of the English Language (unabridged ed., 1967) as modified by the court;

7) "Journal" in terms of The Random House Dictionary of the English Language (unabridged ed., 1967) as modified by the court.

The following People's proposed instructions were refused by the court:

1) "Newsmagazine" as defined by the same Random House dictionary, supra;

2) A map, although it contains incidental, short, printed news which is periodically revised, is not a news periodical;

3) General words should be given a restrictive meaning to avoid unjust and absurd consequences [citing People v. Gray (1940) CR A 1695];

4) Words of general import can be given a meaning to consider the general

purpose entertained by the Legislature in passing the statute [citing People v. Davenport (1939) 13 Cal.2d 681, 685];

5) A rephrasing of Section 42.00(j) in terms of "newspapers, magazines, periodicals or any such printed matter."

The following defense instruction was given by the court:

1) "If you find that the publication involved in this case is a news periodical, you must find the defendant not guilty."

The following defense instructions were refused by the court:

1) "News" can be updated information which has not changed;

2) A periodical includes quarterly publication or any other period greater than one day;

3) A publication can be considered news although it is based on a map;

4) "News" is determined by the kind and not the currency of the information;

5) "News periodicals" are exempted in the statute.

The jury retired to deliberate at 3:05 p.m. At 4:20 p.m., the jury returned to inquire of the court the following: Does the definition of news periodical--as used in People's instruction #5 [defining the term "periodical"]--have to be considered a noun? By stipulation, the following definition of "periodical" was drafted from Webster's New International Dictionary (3rd ed., 1963) and read to the jury:

> "Periodical; Noun. A magazine or other publication of which the issue appears on regular or stated intervals, usually more frequently than annually."

Five minutes later the jury returned with a verdict of guilty.

Respondent filed a timely appeal and prosecuted it through the Appellate Department of the Superior Court for the County of Los Angeles. The result of that appeal is the decision (Appendix A) finding Los Angeles Municipal Code §42.00(d) unconstitutionally overbroad on its face as in conflict with the First Amendment of the United States Constitution. The Appellate

Department of the Superior Court is the highest state court to which direct appeal can be taken. California Penal Code §1466; California Rules of Court, Rule 62, cf. Appendix B and citation therein.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with a decision by the same court and with settled United States Supreme Court authority.

On September 27, 1973, the court below affirmed conviction under the same statute [L.A.M.C. 42.00(e)] and under identical constitutional attack as herein (abridgment of federally protected rights of free speech, equal protection, and due process). That case is now before this Honorable Court as Ramos, et al. v. California, No. 73-6132.

Petitioner respectfully suggests that the Ramos petition and the within petition be considered as companion petitions involving identical issues. Assuming the same, petitioner will avoid repeating duplicate citation from petitioner's "Respondent's Brief in Opposition . . ." in Ramos, supra.

2. The Court below erred in not following settled authority of this Honorable Court which expressly removes commercial sales activities of printed matter upon public streets and sidewalks from First Amendment protection.

While petitioner expresses no opinion as to the breadth of First Amendment protection of commercial enterprises generally (especially so-called "First Amendment industries," i.e., newspapers, radio and television broadcasting), petitioner maintains that the law is crystal clear that commercial printed matter cannot be peddled on public streets and sidewalks under the guise of First Amendment protection.

The leading cases are Schneider v. State (Town of Irvington) (1939) 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146; Valentine v. Chrestensen (1942) 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920; Jones v. Opelika (1942) 316 U.S. 584, 86 L.Ed. 1691, 62 S.Ct. 1231-- reversed on rehearing because of factual redetermination at (1943) 319 U.S. 103, 87 L.Ed. 1290, 63 S.Ct. 890-- and Breard v. Alexandria (1951) 341 U.S. 622, 641-645, 95 L.Ed. 1233, 1247-1249, 71 S.Ct. 920,

35 A.L.R.2d 335; cf. also Note, "Constitutionality of Handbill Ordinances," 35 Northwestern L. Rev. 90, 93 (1940); Resnik, "Freedom of Speech and Commercial Solicitation," 30 Calif.L.Rev. 655, 658 (1942); Note, "Freedom of Expression in a Commercial Context," 78 Harv.L.Rev. 1191, 1195-1196 (1965); Note, "The First Amendment Overbreadth Doctrine," 83 Harv.L.Rev. 844, 858-859, 860, and 909 (1970); Redish, "The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression," 39 Geo.Wash.L.Rev. 429, 430 (1971); Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 105, n.46 (1966); and Pittsford v. City of Los Angeles (1942) 50 Cal.App.2d 25, 32-33, 122 P.2d 535.

All these authorities hold that police power regulation of commercial activities upon public streets and sidewalks is entirely proper and in no way in conflict with the federal First Amendment. Indeed, the First Amendment is deemed to be totally inappropriate in considering the validity of legislative regulation of such commercial activities. In this context "commercial speech" is totally outside free speech

considerations, Schneider v. State, supra, at 165; 78 Harv.L.Rev. 1191 at 1196 (1965); Resnik, supra at 658.

The court below stated in its written opinion (Appendix A, p. 3, lines 12-21),

> "The ordinance involved in the present case, although it excepts 'newspapers or other printed news periodicals' from its prohibition, is also unconstitutionally overbroad on its face in applying to other written material equally entitled to First Amendment protection, such as, for example, political pamphlets and religious tracts. (Lovell v. Griffin [1938] 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666.)" (Emphasis added.)

In basing its holding of constitutional overbreadth upon Lovell v. Griffin, supra, a 1938 case, the court below mistakenly ignored the more recent constitutional developments already cited, i.e., Schneider v. State, supra (1939); Valentine v. Chrestensen, supra (1942), and Breard v. Alexandria, supra (1951).

Los Angeles Municipal Code §42.00(d) is constitutional on its face and as applied herein because it correctly draws the commercial/noncommercial distinction for First Amendment adjudication and then regulates activity solely with the commercial sphere. The ordinance in no way affects noncommercial (protected) activities. By its very language the statute is limited to regulation of "sales" activities.

In construing Los Angeles Municipal Code §42.00(d) to encroach upon the free distribution (or distribution plus small donation) of "political pamphlets and religious tracts," the court below erred. It erred in extending the statute's breadth beyond that limited by the very language of the statute itself. It likewise erred in failing to follow the obligation to construe the statute so as to avoid constitutional conflict. Fox v. Washington (1915) 236 U.S. 273, 277, 59 L.Ed. 573, 575, 35 S.Ct. 383; Garner v. Board of Public Works of Los Angeles (1951) 341 U.S. 716, 724, 95 L.Ed. 1317, 1325, 71 S.Ct. 909; Braxton v. Municipal Court (1973) 10 Cal.3d 138, 145, 109 Cal.Rptr. 897, 514 P.2d 697.

3. The Court below erred in relying on a dictum of Young v. Municipal Court (1971) 16 Cal.App.2d 766, 771, 94 Cal.Rptr. 331 which ostensibly prohibits police power regulation of public sidewalks.

The import of such a municipal police power restriction is large. The dictum is quoted by the Court below at Appendix A, p. 4, line 24 through p. 5, line 8:

> "The ordinance under consideration, however, does not purport to regulate sidewalk sales but, with the noted exception, prohibits them absolutely without regard to time, place, manner, or other circumstances. It does not purport to 'prohibit activities that interfere' with 'primary uses of municipal property' [citation] nor is 'the prohibitory portion of the ordinance . . . narrowly limited to activities which endanger automobile traffic [citing Young, supra]."

The full Young quotation is found at 16 Cal.App.3d 766, 770-771. The Young court, as well as the court herein below, confused

the "overbreadth" of the statute's including noncommercial (protected) as well as commercial (non-protected) activities with the alleged "overbreadth" of including pedestrian-addressed activities as well as vehicular-addressed activities. The former distinction (commercial/noncommercial) is well-founded constitutional law and was itself enough to hold the Young statute overbroad on its face. (Just as in Lovell v. Griffin, supra, and Schneider v. State, supra, the Young statute would have prohibited the noncommercial distribution [". . . or to give away or to offer to give away . . .", Young, supra, at 768, fn.1] of literature.) The latter distinction is totally unfounded. The confusion is compounded by Young's discussing "vendors (commercial activity) as vehicle-addressed whereas "distributors" ("evangelists", "campaigners"--noncommercial) are denominated pedestrian-addressed.

The free press aspects of Young are obviated herein by Los Angeles Municipal Code §42.00(j), the newspaper exemption.

Even the dissenting opinion in Young, supra, acquiesced that the statute must be

construed to forbid:

> ". . . [O]nly that activity at any place along the highway where it would interfere with the free flow of traffic. Certainly that activity not directed to the highway traffic on parts of a sidewalk along the highway is not proscribed."
>
> Young v. Municipal Court, supra, at 772.

That dictum expressly contradicts the holding of this Court in Valentine v. Chrestensen, supra, at 54-55:

> "Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference

with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated." (Emphasis added.)

cf. also Wirta v. Alameda-Contra Costa Transit Dist. (1967) 68 Cal.2d 51, 57, 64 Cal.Rptr. 430, 434 P.2d 982, and Van Nuys Pub. Co. v. City of Thousand Oaks (1971) 5 Cal.3d 817, 821 fn.2, 87 Cal.Rptr. 777, 489 P.2d 809.

To allow modern municipalities to regulate commercial activities on "streets" (curb-to-curb) yet forbid them jurisdiction over appurtenant sidewalks and parkways is a totally unnecessary limit on municipal police power. It is a limit which would emasculate the very municipal police power necessary to effectively protect public safety on public streets and sidewalks. In all the cases cited herein, save Young, supra, "streets" was deemed to include appurtenant sidewalks and parkways. Public easements do not stop at the curb line, but

continue to accommodate appurtenant sidewalks and parkways. Municipal interest in public safety does not end at the curb line, but likewise includes pedestrian thoroughfares. Interference with pedestrian traffic can be equally as serious as interference with vehicular traffic. Nor is municipal police power limited solely to physical pedestrian interference:

> "'Nor is it an objection to the validity of such an ordinance regulating the use of streets [sidewalks, parkways], that the acts prohibited would not in and of themselves necessarily obstruct travel, or in any way create a nuisance. The carrying on of trade or business in the public streets [sidewalks, parkways] by one, or by a few persons, might not be of sufficient consequence to materially obstruct the public travel, while if the same thing should be done by many, it might expect a serious obstruction and nuisance, and what may be done by one in this respect, all must have

an equal right to do.' [citations]." (Emphasis added.)

Pittsford v. City of Los Angeles (1942) 50 Cal.App.2d 25, 32-33, 122 P.2d 535.

4. Municipal regulation of commercial activities on public streets and sidewalks does not violate equal protection of the law by exempting therefrom the sales of newspapers and newsperiodicals.

The issue was well considered by Judge Frank, dissenting, in Chrestensen v. Valentine (1941) 122 F.2d 511, 525 (2nd Cir.). N.B. Judge Frank's dissent was vindicated upon reversal by this Court in Valentine v. Chrestensen, supra.

5. The lower court erred in holding even "under the circumstances of this case" that entitlement to First Amendment protection was a question for the court alone and not for the jury.

The quotation is from the opinion, Appendix A, p. 4, lines 6-11. The error was the assumption that First Amendment protection issues from the nature of the

item itself and not from the manner in which it is being distributed or sold.

The court below apparently confused substantive regulation (regulation of content) with nonsubstantive regulation (regulation of distribution methods and motives). The terms are Professor Redish's, supra. Apparently the court below considered the fact that it was printed matter which was beind sold as controlling the issue of First Amendment protectedness. Winters v. New York (1947) 333 U.S. 507, 510, 92 L.Ed. 840, 847, 68 S.Ct. 665 forbids regulation of the content of publications (short of obscenity, defamation, treason, conspiracy, fraud, false advertising, etc. where traditional substantive regulation is allowed). Los Angeles Municipal Code §42.00(d) could not possibly be construed to be substantive regulation. It is not directed at any form of publication, speech, or expressive activity, except (by attenuated implication) that associated with commercial sales upon public streets and sidewalks.

As nonsubstantive regulation of commercial speech, Los Angeles Municipal Code §42.00(d) [and likewise §42.00(e) in Ramos,

No. 73-6132] is totally proper. It is not overbroad because its regulation extends solely to commercial activities, activities within the scope of traditional municipal regulation and without the scope of First Amendment protection. cf. discussion under point 2, supra. The only question in dispute below was whether or not respondent was engaged in commercial as opposed to noncommercial activity, i.e. whether her conduct was motivated by financial profit as opposed to any other dominant motive. That is purely a question of fact. It must be resolved by the jury, not the court alone, lest respondent's right to a jury trial be abrogated.

Confusion may lie in the fact that the factual determination of whether or not respondent was engaged in commercial as opposed to noncommercial activity is the factor which triggers First Amendment protection vel non. But it remains a factual determination, not a question of law for the court alone. In light of the factual stipulation that respondent was "offering for sale" and "soliciting the sale of" movie maps which the public could "purchase"

upon the parkway where she was arrested, how can the trial court have erred in allowing the question to go to the jury? The Court below was in error in suggesting the matter was for decision without the jury.

The only question in dispute at the trial level was the character of respondent's activity in selling her maps upon the sidewalk; i.e., was it commercial or not. Respondent stipulated that her intent was purely commercial. Finding her guilty of "sales" activity [cf. L.A.M.C. 42.00(d), the charging section], the jury correctly characterized her activity as commercial and simultaneously resolved the issue of First Amendment protection.

6. The decision below raises significant and recurring problems concerning federal constitutional law and the ability of modern municipalities to regulate commercial activities on their streets and sidewalks.

To construe a city ordinace regulating "sales" activities on public streets as in conflict with the federal First Amendment, is to infect the First Amendment

with suicidal breadth. To emasculate every modern city from the power to regulate commercial activity on its own public streets and sidewalks is to debase the First Amendment from its pristine purity and pervert its purpose for the sake of profiteers.

> ". . . [T]he historical events which yielded the constitutional protection of free speech and free expression do <u>not</u> by any means compel or even suggest the conclusion that there is an equally important constitutional right to distribute <u>commercial</u> handbills . . . for the purpose of profit-making. . . ." (Emphasis added.)
>
> <u>Chrestensen v. Valentine</u>, <u>supra</u>, at 524.

"The doctrine of [extending First Amendment protection into commercial activities] involves an extension of freedom of speech into fields that were not envisioned by the founders of the Republic and is in a sense a

mockery of those fundamental rights."

Resnik, supra, at 661.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respectfully submitted,

BURT PINES
City Attorney

WARD G. McCONNELL
Chief - Appellate Section

GERRY L. ENSLEY
Deputy City Attorney

Attorneys for Petitioner

FILED DEC 6 - 1973
BY L. SWART, DEPUTY

APPELLATE DEPARTMENT

OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. VIVIENNE ELLA WELTON, Defendant and Appellant.	Superior Court No. CR A 12083 Municipal Court of the Los Angeles Judicial District No. 794872 MEMORANDUM OPINION AND JUDGMENT

Appeal by defendant from judgment of the Municipal Court, Louis B. Feder, Judge.

Judgment reversed.

For Appellant - Donald Low

For Respondent - Burt Pines, City Attorney by Gerry L. Ensley, Deputy City Attorney

-oOo-

Defendant was convicted of violating section 42.00(d) of the Los Angeles Municipal Code, which prohibits sales and solicitations for sale of any goods, wares or merchandise on any street, sidewalk, or

parkway, except the sale of "newspapers or other printed news periodicals" on sidewalks and parkways.[1/] The basis of her conviction was that she offered for sale and solicited the sale of maps on a parkway, which maps gave addresses of and directions to the homes of movie stars.

Young v. Municipal Court [1971] 16 Cal. App.3d 766 [94 Cal.Rptr. 331] held a local ordinance prohibiting sidewalk sales was unconstitutionally overbroad in its application to the sale of written material entitled to First Amendment protection. After pointing out that "[s]treets, sidewalks and parks are historically associated with exercise of the rights of communication protected by the First Amendment; access to them for the purpose of exercising these rights cannot be denied broadly and absolutely" (pp. 768-769) and that "a local ordinance restricting the sale or distribution of printed matter will survive First

---

1/ Prior to 1972, the exception was broader, specifying "newspapers, magazines, periodicals or any such printed matter."

Amendment challenge only if it serves a legitimate end and is narrowly drawn to achieve that end" (p. 769), the court concluded that "the prohibitory portion of the ordinance is not narrowly limited to activities which endanger automobile traffic" but "extends broadly to peaceful, communicative activities which pose not the slightest hazard to public safety" and "exposes to arrest all who would sell or give pedestrians printed matter." (p. 771)

The ordinance involved in the present case, although it excepts "newspapers or other printed news periodicals" from its prohibition, is also unconstitutionally overbroad on its face in applying to other written material equally entitled to First Amendment protection, such as, for example, political pamphlets and religious tracts. (See Lovell v. Griffin [1938] 303 U.S. 444 [82 L.Ed. 949, 58 S.Ct. 666].) "To effectuate . . . [the ordinance] within constitutional limits," we should interpret the prohibition of sidewalk sales and solicitations as being inapplicable to any material entitled to First Amendment protection. (In re Kay [1970] 1 Cal.3d 930, 943 [83 Cal.

Rptr. 686, 694, 464 P.2d 142, 150].) Since the jury was instructed in the language of the ordinance rather than in accord with the constitutionally compelled limits on its broad language, defendant's conviction must be reversed. Moreover, in our opinion, the question of whether defendant's maps were entitled to First Amendment protection was, under the circumstances of this case, one of law for determination by the court and not the jury.

It is true that the exercise of First Amendment rights on streets and sidewalks or other public property is subject to reasonable regulation and may be prohibited with reference to particular times, places or circumstances. (Cox v. Louisiana [1965] 379 U.S. 536, 554 [13 L.Ed.2d 471, 85 S.Ct. 453]; Cox v. New Hampshire [1941] 312 U.S. 569 [85 L.Ed. 1049, 61 S.Ct. 762]; Young v. Municipal Court [1971] 16 Cal.App.3d 766, 769 [94 Cal.Rptr. 331]; In re Hoffman [1967] 67 Cal.2d 845, 850 [64 Cal.Rptr. 97, 434 P.2d 353].) The ordinance under consideration, however, does not purport to regulate sidewalk sales but, with the noted exception, prohibits them absolutely without

regard to time, place, manner or other circumstances. It does not purport to "prohibit activities that interfere" with "the primary uses of municipal property" (In re Hoffman, supra, 67 Cal.2d at p. 850) nor is "the prohibitory portion of the ordinance . . . narrowly limited to activities which endanger automobile traffic" (Young v. Municipal Court, supra, 16 Cal. App.3d at 771).

The judgment is reversed.

Dated DEC 5-1973

KATZ
Presiding Judge

We concur:

MARSHALL
Judge

SMITH
Judge

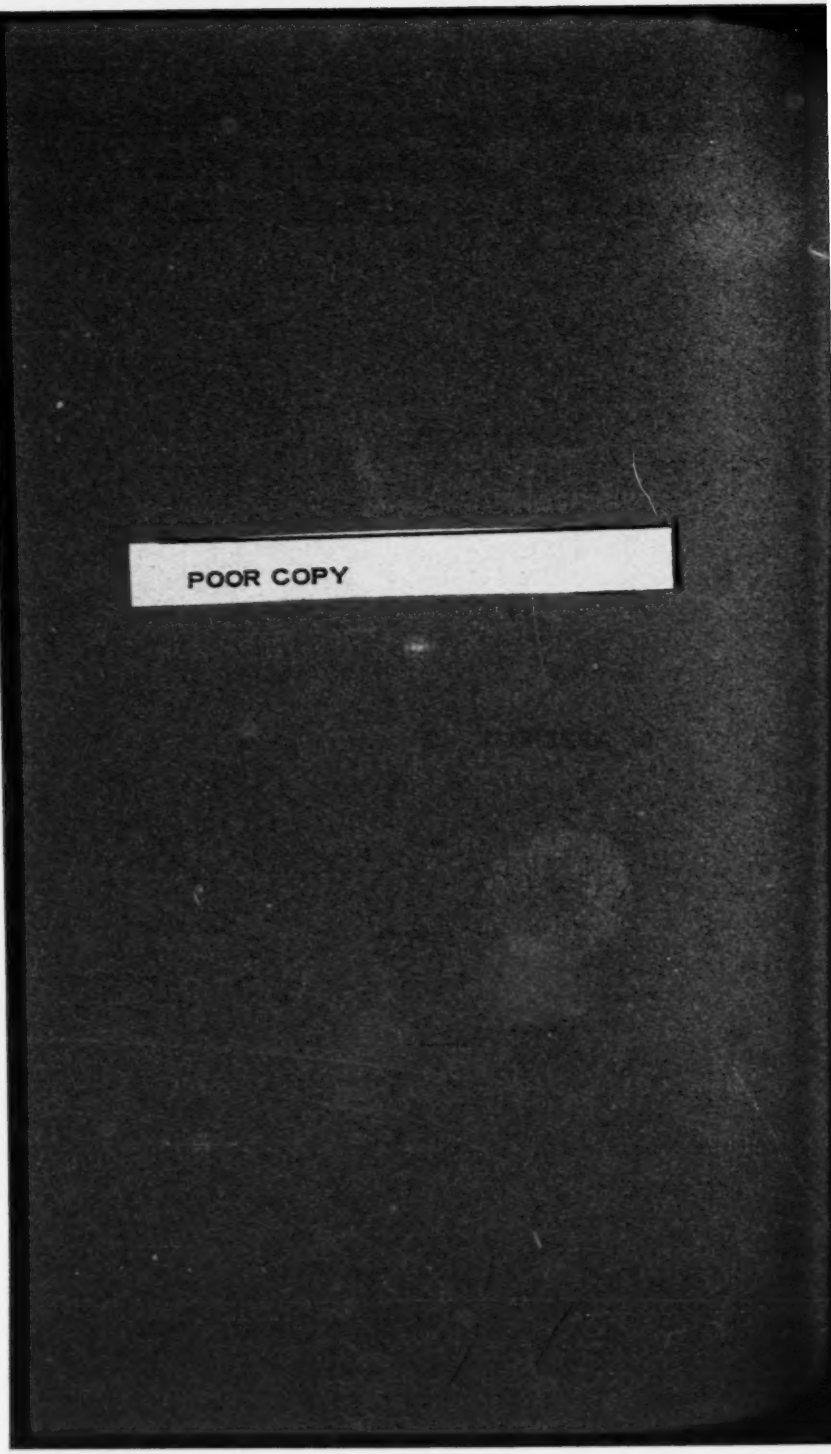
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, AND MUNICIPAL COURT OF THE LOS ANGELES JUDICIAL DISTRICT, Respondent. VIVIENNE ELLA WELTON, Real Party in Interest.	2d Civ. 43547 O R D E R Court of Appeal Second Dist. FILED JAN 18 1974 Clay Robbins, Jr. Clerk

THE COURT:

The petition for writs of certiorari and of prohibition has been read and considered. It is denied on the grounds that the conditions for transfer set forth in Rule 62, California Rules of Court, have not been complied with. (Cf.

Whittaker v. Superior Court, 68 Cal.2d 357, 365; People v. Allenthorp, 64 Cal.2d 679 682; Adams v. Superior Court, 8 Cal.App.3d 569, 572.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ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 5, CIVIL No. [illegible]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

PEOPLE, PETITIONER

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY [illegible], RESPONDENT;

WILSON, REAL PARTY IN INTEREST.

Petition for hearing DENIED.

I, G. E. DANIEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 6th day of March A.D. 1974

By [signature] Deputy Clerk

SUPREME COURT

FEB 14 1974

C. [illegible]

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FILED

DEC 20 1973

CLARENCE E. [illegible] Clerk

BY L. SHANE, Deputy

APPELLATE DEPARTMENT OF THE SUPERIOR COURT

OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. VIVIENNE ELIA WELTON, Defendant and Appellant.	Superior Court No. CR A 12[illegible] Municipal Court of the Los Angeles Judicial District No. 79487? ORDER DENYING REHEARING AND DENYING CERTIFICATION

The petition of respondent for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal in the above-entitled case having been filed and having been duly considered,

Said petitions are hereby denied.

Dated DEC 20 1973

BY THE COURT

[illegible]
Presiding Justice

[illegible]
Judge

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1397

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

VIVIENNE ELLA WELTON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1397

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

VIVIENNE ELLA WELTON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, VIVIENNE ELLA WELTON, respectfully prays that the Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, be denied.

I

INTRODUCTORY STATEMENT

Following her conviction in the Los Angeles Municipal Court for violation of Section 42.00(d) of the Los Angeles Municipal Court, respondent appealed to the Appellate Department, and won reversal of her conviction.

Among the grounds for appeal asserted were:

1. L.A.M.C. §42.00(d) in conjunction with L.A.M.C. §42.00(j) is unconstitutional in that its provisions are overbroad, proscribing constitutionally protected written material along with non-protected matter.

2. Subsection (j) in affording protection to newspapers and news periodicals while denying protection to other printed material, is discriminatory and denies to respondent the equal protection of the law.

The Appellate Department ruled that L.A.M.C. §42.00(d), as amended, was unconstitutional on its face, but remanded the case to the Municipal Court for further proceedings.

Prior to its amendment, L.A.M.C. subsection (j) commonly known as a "savings clause", exempted all printed material from the operation of L.A.M.C. §42.00(d), the ordinance which banned sale of goods, wares and merchandise upon and along public streets. It was the 1972 amendment of subsection (j), reducing protected material to an arbitrary category of newspapers and news periodicals, which formed the basis of respondent's appeal.

The prosecution is now petitioning this Honorable Court to review and challenge the Appellate Department's finding.

II

BASIS FOR THE HOLDING OF UNCONSTITUTIONALITY-UNCONSTITUTIONAL OVERBREADTH

This Court has long held that Municipal ordinances which violate an individual's right of freedom of speech and press guaranteed by the First Amendment, constitute unlawful State action under the 14th Amendment, and will be struck down. See Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct.

666 (1938). It has been long recognized that the right to distribute ideas and written materials constitutes an important part of free speech, as well as free press. See Lovell, supra; see also Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943).

A local ordinance restricting the sale and distribution of printed matter will survive First Amendment challenge only if it serves a legitimate end and is narrowly drawn to achieve that end. See Lovell v. City of Griffin, supra; see also Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943).

The ordinance in question, L.A.M.C. §42.00(d) restricts the sale of goods, wares and merchandise on any street, sidewalk or parkway. In making this restriction, the legislature has also banned the sale of all printed matter without regard to its content. The savings clause, subsection (j), exempts only newspapers and news periodicals.[1/] Thus, the result is

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1/ Unquestionably, this is a denial of equal protection, as the distinction is arbitrary. This was urged in the Court below, however the opinion of unconstitutionality was based on an "overbreadth" evaluation.

to ban such traditionally protected material as religious pamphlets, political treatises, and other educational and informative material.

III

PETITIONER'S FAILURE TO DISTINGUISH BETWEEN COMMERCIAL ADVERTISING AND COMMERCIAL ACTIVITY

Petitioner asserts that "the law is crystal clear that commercial printed matter cannot be peddled on public streets and sidewalks under the guise of First Amendment protection." See Petitioner's Brief, page 18.

In support thereof, the cases of Schneider v. State, 308 U.S. 147, 60 S.Ct. 146 (1939), Valentine v.Chrestensen, 316 U.S. 52, 62 S.Ct. 920 (1942), and Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920 (1951), are cited.

In citing these cases, for the proposition that commercial activity cannot be regulated, petitioner fails to recognize the distinction between prohibiting purely commercial advertising and prohibiting the sale or distribution of informative

material from which the distributor derives a profit.

To hold that the mere profitability of an enterprise subjects it to a wholesale ban, would be to disregard all of the cases dealing with magazines, movies, and books, as their purveyors certainly are engaged in commercial, profitable, activity.

Valentine v. Chrestensen, supra, is inapplicable to the case at bar, for in Valentine, the Court was concerned only with the question of whether the application of an ordinance to the respondent's activity was, under the circumstances, an unconstitutional abridgement of freedom of speech and press. In holding that it was not, the Court determined that purely commercial advertising was not protected speech, and the respondent there was using a subterfuge to advertise his product.

Similarly, the Breard case is inapplicable to the case herein, inasmuch as petitioners there were arrested for soliciting subscriptions for a nationally-known magazine. Solicitation of subscriptions is commercial advertising, and is

distinguishable from the sale of the magazines themselves. Such a distinction was drawn by the California Court of Appeal in In Re Mares, 75 Cal.App.2d 798, 171 P.2d 762 (1946).

The Pittsford case,[2/] also cited by petitioner, at page 27 of his brief, does not apply here. Once again, in Pittsford, the ordinance upheld was one preventing the distribution among pedestrians or persons in vehicles of commercial advertising handbills, or any handbills distributed for the purpose of advertising any merchandise. The ordinance there was thus a narrowly-drawn one, limiting only the distribution of commercial advertising matter. Thus, petitioner's conclusion that "municipal regulation of commercial activities upon public streets and sidewalks is entirely proper", fails to make the crucial distinction between commercial activity and commercial advertising.

The ordinance in question is a wholesale ban on all printed material without

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2/ Pittsford v. City of Los Angeles, 50 Cal.App.2d 25, 122 P.2d 535 (1942).

regard to its content. It is for that reason that the Appellate Department struck it down.[3/]

IV

THE COURT BELOW COMMITTED NO CONSTITUTIONAL ERROR IN FOLLOWING YOUNG v. MUNICIPAL COURT, 16 Cal. App.2d 766, 94 Cal.Rptr. 331 (1971)

In Young v. Municipal Court, supra, the California Court of Appeals had before it an ordinance very similar to the one at bar. However, the Young ordinance did not have any savings clause whatsoever. The Court dealt with a blanket ban on the sale of goods, wares and merchandise along or upon any public road or highway.

In granting a Writ of Prohibition and declaring the ordinance unconstitutional,

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3/ The issue of whether respondent's movie maps are protected matter wss never decided in the Court below, since where a provision restricting free speech and press is involved, a Court in considering the claim of overbreadth may take into account the operation of the provision as to factual situations other than the one at bar. See, e.g., N.A.A.C.P. v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963).

the Court declared inter alia: ". . . the prohibitory portion of the ordinance is not narrowly limited to activities which endanger automobile traffic. It extends broadly to peaceful, communicative activities which pose not the slightest hazard to public safety. It exposes to arrest all who would sell or give pedestrians printed matter. The ordinance is unconstitutionally overbroad because its first section would punish constitutionally protected activities, although a narrower measure would fully achieve the objective . . . ." Young, at 771.

This holding was not dictum, as petitioner states, but rather it is the holding of the case.

Furthermore, the activity in question in Young was the sale of the Berkeley Barb, a local newspaper. The seller of that newspaper was clearly engaged in a commercial activity, but not engaged in commercial advertising, a distinction which petitioner throughout his petition fails to recognize.

Petitioner continuously refers to Valentine v. Chrestensen, supra, as being in contradiction to the holding in Young and the lower Court's ruling. As indicated earlier in this response, Valentine only holds that purely commercial advertising, non-informative material, is not protected. We deal here with an ordinance which overbroadly restricts the sale and distribution of informative material, as well.

V

THE CASE OF RAMOS, ET AL. v. CALIFORNIA, 73-6132, SHOULD NOT BE CONSIDERED AS A COMPANION PETITION INVOLVING AN IDENTICAL ISSUE

The Ramos case deals with a defendant's appeal after conviction under ordinance L.A.M.C. §42.00(e). This case involves a petition by the People, challenging the declaration of unconstitutionality of ordinance L.A.M.C. §42.00(d).

We are thus dealing with separate sections of an ordinance and separate bases for review. There would therefore appear to be no reason to consider the two

petitions as companions. They do not involve identical issues.

VI

CONCLUSION

For the foregoing reasons, respondent requests that this Honorable Court deny the petition for Writ of Certiorari.

Respectfully submitted,

DONALD LOW

Attorney for Respondent
Vivienne Ella Welton